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July 22, 2024

Re: FuboTV Inc. et al. v. The Walt Disney Company et al., No. 24-cv-01363

Dear Judge Garnett:

Defendants respectfully oppose Fubo's request to submit hours of designated deposition testimony for the Court's review outside of the PI hearing. *See* Dkt. No. 221. The Court already has extended the length of the hearing to include a fourth day. That is sufficient to hear testimony—either live or by designation—that the parties intend to present at the hearing. There is no basis to burden the Court with hours of additional testimony in the manner Fubo suggests.¹

Defendants are prepared for their designations to count against their trial time, as long as Fubo's do as well.² Indeed, deposition designations, by definition, constitute a precise, entirely self-selected length of testimony, and Fubo should be required to plan its case accordingly, as other litigants typically do in this Circuit.³

¹ Fubo goes so far as to claim that "playing video testimony in court will duplicate work because the Court will need to independently review the parties' designations to rule on objections". (Dkt. No. 221 at 1-2.) That is the tail wagging the dog. Defendants intend to use any such objections sparingly, such that they do not anticipate objections should dictate whether designations should be played during trial time.

² Defendants also reserve the right to designate deposition testimony from witnesses on Fubo's live witness list if those witnesses do not ultimately appear.

³ Fubo cites several out-of-Circuit cases in its footnote (*see* Dkt. No. 221 n.1); however, judges in this court often follow the typical procedure of having designated deposition testimony presented at trials and similar hearings. *See, e.g., Optima Media Grp. Ltd. v. Bloomberg L.P.*, No. 17-CV-01898 (AJN), 2021 WL 1941878, at *4 (S.D.N.Y. May 14, 2021) ("The Court held a nine-day bench trial . . . The Court heard live testimony from six witnesses and watched the deposition testimony of five others."); *Corenco Corp. v. Schiavone & Sons, Inc.*, 362 F. Supp. 939, 942 (S.D.N.Y.), *aff'd and remanded*, 488 F.2d 207 (2d Cir. 1973) ("The evidence introduced at the trial on August 3rd and 4th consisted of live testimony, as well as deposition testimony and documentary evidence."); *In re Fosamax Prod. Liab. Litig.*, 742 F. Supp. 2d 460, 474 n.7 (S.D.N.Y. 2010) (noting that "[a]ll depositions referenced in this Opinion and Order [on a motion for judgment as a matter of law] were videotaped and played for the jury during trial").

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CRAVATH, SWAINE & MOORE LLP

Sincerely,

/s/ J. Wesley Earnhardt
J. Wesley Earnhardt

The Honorable Margaret M. Garnett
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cc: All counsel of record

VIA ECF